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Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-526

JESUS NOVELO PERREIRA,
Petitioner,

versus

DAMPSKIBSSELSKABET NORDEN A/S and the M. S. NORDPOL,
Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MAY IT PLEASE THE COURT:

The petitioner's application for a writ of certiorari should be denied and the decisions of the lower courts should not be disturbed or modified in any respect. The district court, in a well-reasoned and sound opinion, granted the motion of respondent for a summary judgment and dismissed petitioner's suit, on the correct conclusion that petitioner was not entitled to relief under the Jones Act, 46 U.S.C. 688, or under the general maritime law of the United States. The United States

Court of Appeals for the Fifth Circuit concluded that the decision of the district court was sound in fact and in law, and, after placing the case on the summary calendar, the court later affirmed the district court holding.

As will be shown hereafter, the decisions of the two courts below are correct and in no way call for or suggest any reason for this Court to grant a writ of certiorari. Furthermore, and as also will be shown hereafter, petitioner's statement of the facts is inaccurate in a number of important details, and his assertion that there is a conflict in the decisions of the Courts of Appeal is unfounded when the applicable opinions are properly interpreted in light of the guidelines set forth by this Court.

STATEMENT OF THE FACTS

Petitioner is and has been a citizen and resident of Mexico all of his life.[1] At the time in question, petitioner was living in Merida, Mexico, where he resided with his family and where he returned after the accident.[2]

Petitioner's only connection with the United States has been related to his obtaining a non-immigrant visa on several occasions which allowed him to remain in the United States 30 days.[3] He entered the United States as a foreign seaman in transit, and was permit-

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[1]Depo. Pereyra p. 3; R. 7 (Note: Petitioner's name has been consistently misspelled; it is spelled "Pereyra" on his passport.)
[2]Id. at 3 & 46; R. 7 & 50
[3]Id. at 9; R. 13

ted to obtain employment aboard foreign flag vessels that call at United States ports.[4] Petitioner first entered the United States on a seaman's visa in 1968 and sailed aboard several foreign ships during 1968 and 1969.[5] The record establishes that petitioner sought foreign employment by this means, rather than by joining foreign flag vessels at Mexican ports, because he could avoid penalties imposed upon Mexican citizens who sailed foreign from Mexican ports.[6] The record does not establish what petitioner did during most of 1970, but, on March 1, 1971, he returned to New Orleans on a non-immigrant (temporary) visa aboard Pan American Airways Flight 508, again solely to obtain employment aboard a foreign flag vessel.

On March 8, 1971, about one week after arrival, petitioner ascertained through the Scandinavian Shipping Office in New Orleans that a job as a seaman was available aboard the M/S NORDPOL, a Danish vessel.[7] Petitioner signed aboard the vessel that same day and executed the required Danish Seaman's contract. The agreement contained, among other provisions, the statement that both parties were bound by Danish law and Danish terms and conditions of employment, as established by the Danish Seamen's Union agreement with the shipowner.[8] Such contracts are validated (stamped) by the Danish Consulate.[9] Petitioner knew, having been advised both verbally and

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[4]Id. at 7; R. 11, Depo. Eide pp. 39-40; R. 121-122.
[5]Depo. Pereyra p. 6; R. 10
[6]Id. at 56; R. 60
[7]Id. at 11; R. 15
[8]Depo. Eide p. 13; R. 95
[9]Id. at 15; R. 97

in writing, that the ship was a Danish flag vessel, that Danish law would govern all relationships between him and the owners throughout his term of employment, and that his work would be performed under the orders and supervision of the Danish officers who commanded the vessel.[10]

The ship proceeded from New Orleans to Houston and then returned to New Orleans for further loading before going foreign. Petitioner allegedly was injured aboard the vessel at New Orleans. He was removed from the vessel and received medical attention, the cost of which was borne by respondent, at the New Orleans Public Health Service Hospital.[11]

In May, 1971, two weeks after he was pronounced fit to travel, petitioner returned to his home in Mexico, where he still resides.

The record fully establishes that respondent has paid petitioner everything due him under Danish law.[12] Danish law provides that, in the case of illness or injury, the seaman is to receive full medical treatment plus one month's sick wages in the amount of $226.55. After the expiration of the first month of illness or injury, an additional daily allowance is paid from the Danish State Insurance Company, which after deduction of Danish taxes, totals $6.61 a day.[13] Pursuant to these laws, respondent provided petitioner wages

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[10]Id. at 31-32 & 37; R. 113-114 & 119
[11]R. 160
[12]Ibid
[13]R. 159

for service aboard the vessel and all Danish benefits to which he was entitled, including sick wages, air transportation, and daily living expenses, along with medical treatment at New Orleans and later at his home in Merida, Mexico.[14]

M/S NORDPOL is a bona fide Danish Flag vessel, owned by respondent, Dampskibsselskabet Norden Aktieselskab. The owning company is a limited liability company organized and existing under and by virtue of the laws of the Kingdom of Denmark.[15] It is established that all of the shareholders, with two completely minor and insignificant exceptions, are Danish citizens, or Danish corporations, associations or institutions having absolutely no connection, directly or indirectly, with the United States.[16] The sole exceptions of stock ownership are a Swedish municipality authority and a single United States resident who owns .013% of the company's stock.[17]

Respondent has no affiliated or subsidiary companies or corporations in the United States or relationship or dealings in or with the United States and is not in any way affiliated with any person, firm, or corporation that does business in the United States.[18]

M/S NORDPOL is an ocean-going motorship which was delivered to respondent at Nakskov Shipyard in June, 1955. She has been continuously owned by re-

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[14]R. 160
[15]Findings of Fact, R. 139
[16]Ibid
[17]Ibid
[18]R. 157

spondent since that time, and has been at all times employed in foreign (worldwide) trade for the most part under time-charters. Since August, 1968, the vessel has traded to the east coast of Canada, to the west coast of South America, to Europe, to the West Indies, to Mexico, and to the United States.[19]

On the occasions when the vessel has called under charter at United States ports, the ship has been serviced by local United States agents. On the occasion when the vessel called in New Orleans, respondent appointed Biehl & Company to act for the inbound and outbound clearance of the ship and for other details relating to the loading of soybean meal for carriage and discharge in Europe.[20]

The crew of the M/S NORDPOL at the time in question consisted of 31 men who were for the most part (22 in all) Danish nationals, and nine others who were citizens of Iceland, Honduras, Mexico, Chile, and Sweden. All crewmembers were employed under and by virtue of the Danish Seamen's Union agreement with the owners which recited that Danish law would control all of the terms and conditions of employment.[21] From 1967 through April, 1971, the NORDPOL called at ports of the United States only five times.[22]

The Scandinavian Shipping Office, Inc., which referred petitioner to the NORDPOL, is not licensed by

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[19]R. 158
[20]R. 158 & 159
[21]R. 159
[22]Findings of Fact, R. 139

Denmark or controlled by any Danish organization.[23] To the contrary, Scandinavian Shipping Office, Inc. is licensed by the State of Louisiana and is operated solely by one employee, whose sole purpose and function is to act as a referral agency for the convenience of foreign seamen and foreign ships.[24] About 80% of the seamen referred to ships through the Scandinavian Shipping Office in New Orleans are Norwegian seamen referred to Norwegian vessels. About 10% of the seamen referred to ships through the office are referred to Swedish vessels, and the remaining 10% are referred to Danish vessels.[25] The company has nothing to do with the operation and maintenance of ships or with personnel aboard ships; it acts only as a referral agency for foreign seamen to obtain employment aboard foreign flag vessels.[26] The company does not act as agent or representative of vessels and plays no part whatsoever in the handling of personnel after they are employed or when they are sick or in need of medical or other attention.[27] Immediately after the referral of a seaman is accomplished, the seaman reports on his own to the master of the vessel in order to determine whether he wishes to accept the engagement and for the master to decide whether he wishes to accept the seaman.[28] If at this stage, the parties decide to enter into a contract of employment, the contract is then executed aboard the vessel, under the

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[23]Depo. Eide pp. 23 & 38; R. 107 & 120
[24]Id. at 36 & 38; 118 & 120
[25]Id. at 24; 106
[26]Id. at 26; 108
[27]Id. at 22; 104
[28]Id. at 13; 95

law of the flag of the vessel and under the terms and conditions of employment specified by the law of the vessel's flag.[29]

In the case of the vessel involved herein, petitioner obligated himself to the terms and conditions of employment set forth under Danish law and specified in the contract previously entered into between the Danish owners and the Danish union that represented the seamen aboard the vessel.[30] In fact, the record establishes that the seamen are routinely advised in advance that they will be subject exclusively to the law of the flag of the vessel aboard which they serve.[31] Advices regarding the applicability of the contract are passed on to the seamen verbally and in writing.[32] As required by the law of the vessel's flag, and as required by the contract of employment between the Danish union and the Danish owner, the seaman is obliged to join and must become a member of the Danish union as a prerequisite to employment aboard the Danish vessel.[33] The record establishes that these prerequisites of employment were all complied with by petitioner at the time of his employment aboard the NORDPOL in March, 1971.

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[29]Id. at 27; 109
[30]Ibid
[31]Depo. Eide pp. 31-32 & 37; R. 113-114 & 119
[32]Id. at 33; 115
[33]Id. at 37; 119

THE JONES ACT AND THE GENERAL MARITIME LAW OF THE UNITED STATES ARE NOT APPLICABLE AND THE DECISIONS OF THE DISTRICT COURT AND OF THE COURT OF APPEALS DECLINING JURISDICTION AND DISMISSING THE SUIT WERE CORRECT AND THE WRIT OF CERTIORARI SHOULD BE DENIED

The laws of the country of a vessel's registry and flag govern all matters relating to her internal operations, which includes all matters relating to personal injury and illness.[34]

In light of the above principle of law, the lower courts in the present case correctly concluded that the law of the United States does not apply in this instance. The number and magnitude of contacts in the present case all predominate in favor of Denmark. The shipowner is a bona fide Danish company having no connection, directly or indirectly, with the United States. The shipowner's base of operations is and has always been Denmark. The vessel is navigated and operated predominantly by Danish nationals through a Danish union under a Danish contract of employment verified and supervised by the Danish Consulate when in foreign ports. The ship flies the Danish flag and operates

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[34] *Wildenhus' Case*, 120 U.S. 1, 30 L.Ed. 565; *United States of America v. Flores*, 289 U.S. 137, 77 L.Ed. 1086; *National Steam Navigation Co., Ltd. v. Dyer, et al*, 105 U.S. 24, 26 L.Ed. 1001; *Lauritzen v. Larsen*, 345 U.S. 571, 97 L.Ed. 1254; *Hellenic Lines Ltd. et al. v. Rhoditis*, 398 U.S. 306, 26 L.Ed. (2d) 252

under charter on worldwide foreign voyages. From 1967 through April, 1971, the ship called at ports in the United States only five times.

In the courts below, and again in this Court, petitioner continues to misinterpret, misconstrue, and place improper interpretations upon the case of *Kyriakos v. Goulandris*, 151 F. (2d) 132. In *Kyriakos*, unlike the present case, the shipowner had offices in the United States and was actually doing business as a shipowner through its United States offices. Nevertheless, the Court's statement, made long before this Court set out the proper guidelines in *Lauritzen* and *Rhoditis*, supra, that signing aboard a foreign flag vessel in an American port and being injured in an American port is sufficient "on reason and on authority" to sustain jurisdiction, is so patently contrary to the holding of *Lauritzen* and *Rhoditis*, supra, as to make it clear that *Kyriakos* was overruled by *Lauritzen*. Indeed, a reading of the dissent in *Kyriakos*, at p. 139, rendered by Learned Hand, really formed the base of reasoning accepted by this Court in *Lauritzen*, wherein this Court gave paramount importance to the law of the flag. As Judge Hand said, and as this Court held in *Lauritzen* and affirmed in *Rhoditis:*

> "... it is generally accepted law that in all matters relating to the 'internal economy or discipline' of a ship 'the law of the flag' controls. ... And it seems to me most undesirable, except for some pressing reason of domestic policy to disregard it. ... As I have just said, I can discover no reason of policy or of authority for displacing that law. ..."

Furthermore, a review of the seven considerations set out in *Lauritzen* and *Rhoditis* will show why the district court and the Court of Appeals concluded — and, we submit, correctly concluded — that the law of the United States is not applicable to the present case.

First, the place of the wrongful act in the instant case was not really the Port of New Orleans because the accident allegedly occurred aboard the M/S NORDPOL. The United States has consistently and without semblance of deviation held that the law of the United States does not govern "the general relation of the rights and duties of the officers and crew towards the vessel or among themselves" when the vessel involved is a foreign flag ship. See *Wildenhus' Case*, supra. Accordingly, it is the established law of the United States that the "jurisdiction and laws of a nation accompany her ships ... into ports and harbors . . . for the general purpose of regulating the rights, duties, and obligations of those on board." *United States of America v. Flores*, supra. As a result, the M/S NORDPOL, a Danish registered vessel flying the Danish flag, was recognized by the United States while at the Port of New Orleans in March, 1971 — as well as by all nations and wherever she called — as part of the territory of Denmark, and she did not lose that national identity while in the territorial limits of the United States. Furthermore, as a Danish vessel, she was and is governed by the laws of Denmark at all times — "wherever she goes" — and those laws alone "regulate the mutual relations" of her master and her crew and her owners. As a consequence, the

laws of the United States cannot interfere in her internal operations, including the relationship between the seamen and her owners for the purpose of determining rights and liabilities for personal injury or illness.

It hardly seems necessary to examine the rationale of this principle, or to point out why it has developed in international law. Obviously, without understanding among nations that the law of a vessel's flag shall govern her internal affairs — one of the most obvious and elementary of which is the regulation of personal injuries and illnesses — substantial conflicts in the laws of the nations would develop, and the shipowners could never know from day to day under what law a vessel is operating. The legal relations of shipowner and crew toward each other would vary from day to day by the accident of place. As this Court said in the case of *Romero v. International Terminal Operating Co. (Spanish Line)*, 358 U.S. 354, at p. 384, 3 L.Ed. (2d) 368, at p. 389 (1959):

> "* * * *To impose on ships the duty of shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would be not only an onerous but unduly speculative burden, disruptive of international commerce and without basis in the expressed policies of this country.* The amount and type of recovery which a foreign seaman may receive from his foreign employer while sailing on a foreign ship should not depend on the wholly fortuitous circumstance of the place of injury." [Emphasis ours]

It is clear, therefore, that since the accident occurred aboard a Danish vessel, it did not occur, under correct legal interpretation of international maritime law, in the United States but on an entity — the foreign ship — recognized as Denmark, or Danish territory.

Secondly, nothing further need be said concerning the fact that the M/S NORDPOL was and is a Danish flag vessel. Petitioner has indeed conceded, brief p. 20, that the ship here was a "Danish flag — a factor in application of Danish law."

Thirdly, the allegiance and domicile of petitioner is and always has been Mexico, where he makes his home, where he lives and resides, and where he returns after employment aboard foreign flag vessels. In fact, petitioner's only connection with the United States has been during 1968, 1969 and 1971, when he has been in New Orleans a few days to seek employment aboard foreign flag vessels to avoid penalties that would be imposed had he joined such vessels in Mexico. Petitioner is not and has never been a resident of the United States or domiciled in this country. His appearances here have been of short duration under a temporary visa to seek employment aboard foreign ships and then immediately to leave. There is no evidence that petitioner has ever remained any appreciable time in the United States, or that he has ever had any intention of remaining in this country. As the district court correctly stated, the appearance

of a seaman at a United States port to obtain employment can hardly create such an interest in the United States as to call into play the laws of this country and, more particularly, to make them applicable to a foreign seaman while he is aboard a foreign flag vessel. As a result, petitioner's contention that the allegiance of plaintiff to the United States "is as much ... as any other country" is untenable because petitioner's allegiance is clearly to Mexico and not to the United States.

The fourth factor, is allegiance of the shipowner which, in this case, is Denmark. Petitioner argues, however, that the Danish owner has "an alter-ego and/or employee ... permanently in the United States in order to procure seamen", and from this wholly unsupported comment petitioner reasons that respondent's allegiance is to the United States rather than to Denmark. The record establishes, however, that the allegiance of Dampskibsselskabet "Norden" Aktieselskab, respondent, is and has always been the Kingdom of Denmark and that the Scandinavian Shipping Office, Inc., the alleged "alter-ego", is a Louisiana licensed company operated by a single individual on behalf of numerous Scandinavian and Norwegian shipowners and unions solely to refer foreign seamen for employment. As the district court said, Scandinavian Shipping Office "is in reality nothing more than an employment agency [and] does not transfer the allegiance of the Danish corporation or its stockholders to the United States."

It should be noted that a Dutch alien was referred to a Norwegian vessel through the New York branch of the Scandinavian Shipping Office in *Tjonaman v. A/S GLITTRE,* (2 Cir. 1965) 340 F. (2d) 298, cert. den. 381 U.S. 925, reh. den. 382 U.S. 873, but the court did not consider this fact significant in the weighing of *Lauritzen* factors. The seaman there was identically situated with petitioner, except that he was injured beyond United States territorial waters. The Second Circuit had no hesitancy in applying Norwegian law and emphasized the Norwegian articles and Norwegian union membership. The court properly concluded that Tjonaman's rights should be no greater than his shipmates under Norwegian law.

The same result was reached in *Shahid v. A/S LUDWIG MOWINCKELS REDERI,* (S.D.N.Y. 1964) 236 F.Supp. 751, where an Egyptian seaman was injured in New York, the port from which he signed aboard the vessel. There, as here, the Scandinavian Shipping Office had referred the seaman to the Norwegian vessel, but the court found plaintiff failed to show sufficient factors to displace the law of the flag. Neither should this Court be misled by petitioner's unfounded attempt to relocate respondent's true allegiance.

The next and fifth factor is the place of the contract. Although the ship at the time of the contract was in New Orleans, the place of the contract was aboard the Danish vessel, which, as previously shown, has been consistently interpreted by our courts to be part of the country whose flag the vessel flies. In addition, in the instant case, the record is clear and undisputed

that petitioner entered into a Danish contract and was obligated to be bound by Danish law and Danish terms and conditions of employment; and that he fulfilled the Danish prerequisite of becoming a member of the Danish Seamen's Union. Consequently, and as the district court held, "the place of the contract points to Danish law" and away from American law.

As to the sixth factor, the accessibility of the foreign forum, there is also little dispute, despite petitioner's contentions to the contrary. Petitioner has been paid his full benefits under Danish law. The statement of petitioner that he was not paid Danish benefits is unsupported and completely inaccurate. The truth is that the attorneys for petitioner were attempting to prevent petitioner from being returned to his home in Mexico after the Public Health doctors had declared petitioner fit for travel and able to return home. When the doctors and the Immigration authorities cleared petitioner for return to Mexico, appropriate arrangements were made and proper advances were tendered and paid. In any event, petitioner's arguments concerning payments or lack of timely payments can hardly overcome the only significant fact involved relating to the foreign forum: the forum has been and is accessible and the Danish benefits due petitioner have been paid.

The last factor, the law of the forum, obviously ceases to be a factor, in light of the evidence that petitioner has received the full benefits available under Danish law. As the district court stated, the law of the United States cannot be applied "where the con-

nection between this country is slight and fortuitous; ... this principle does not detract from application of Danish law."

In summary, and viewed in proper perspective, the number and magnitude of the contracts with Denmark – the occurrence aboard a Danish vessel, the law of the flag, the allegiance or domicile of petitioner, the allegiance of the shipowner, the place of the contract aboard a Danish vessel, the accessibility of the Danish forum — all require the application of the law of Denmark and not the law of the United States to the instant case.

CONCLUSION

The application for a writ of certiorari should be denied. The holding and judgment of the lower courts, declining jurisdiction and dismissing this suit, is in every respect sound in law, consistent with the decisions of this Honorable Court and in no way in conflict with the decisions of the courts of appeal. Under the guidelines — indeed, the prerequisites — set forth in *Lauritzen* and *Rhoditis*, the law of the United States is not applicable to this case. This conclusion results from the following undisputed facts and law, all of which is reflected in the record of this case, in the decisions of this Court, and in the decisions of the lower courts in the instant case:

(1) The vessel, the M/S NORDPOL, has been engaged throughout its entire period of operation and ownership by respondent as a

bona fide foreign flag vessel, flying the flag of and registered in Denmark;

(2) Under international law, as received and accepted in the courts of the United States, the law of the flag governs the internal order and economy of a ship, including the rights and duties of seamen and owners in matters involving personal injury and illness; in this instance, the Danish, and not the American law;

(3) One of the most fundamental of the matters of internal order and economy is the relationship of the crew of a vessel to her master and owner in matters involving personal injury and illness; and these, as elementary propositions of law, are governed by the law of the flag of the vessel, regardless of where the personal injury or illness occurred or arose, unless other unusual and extreme factors are involved pertaining to the interests and welfare of the United States and United States citizens, to cause our laws to be superimposed upon and take precedence over the laws of a vessel's flag and country; and no such extenuating circumstances exist nor have even been suggested in the present case;

(4) Nothing in our law or in any of this Court's decisions suggests or indicates that the laws of the United States are applicable to the bona fide Danish vessel involved in this case;

(5) Any attempt by our courts to exercise jurisdiction in this case and apply the law of the United States would be a plain disregard and violation of international law and a breach of international faith between the United States and Denmark; and any such application would be a step toward international chaos in shipping circles, as one could certainly anticipate retaliatory action by Denmark and other Scandinavian countries, who would be disposed to make their laws applicable to American ships under identical or similar circumstances;

(6) And, finally, in the instant case, viewed in light of the applicable decisions of this Court and the opinion and judgment of the lower courts, the application for a writ of certiorari should be denied.

Accordingly, petitioner's application for a writ of certiorari should be denied.

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CERTIFICATE

I hereby certify that copies of the above and foregoing brief have been served upon attorneys for petitioner by depositing same in the United States mails, postage prepaid, and properly addressed to them at their office.

New Orleans, Louisiana, November ——, 1972.

William E. Wright